

ADMINISTRATIVE APPEAL DECISION

COXCO REALTY, LLC; FILE NO. 200000935 -FJD

LOUISVILLE DISTRICT

APRIL 30, 2003

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division, Dallas, Texas

Louisville District Representatives: Lee Ann Devine, Ann Nunn and Frank DeGott

Appellant Representatives: Kent Campbell and Hal Bryan of Eco-Tech; Vaiden Cox, James Cox and Charles Cox of Coxco Realty LLC; Bill Bardenwerper of Bardenwerper & Lobb; Richard Moore of R.W. Moore Engineering; Mike French, Developer-Broker; and Tim Corrigan of Lewis & Corrigan

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344).

Receipt of Request For Appeal (RFA): October 17, 2002

Appeal Meeting/Site Visit Date: March 18, 2003

Background Information: The 64-acre, undeveloped site is located at the northwest corner of McCawley Road and Jefferson Boulevard, Jefferson County, Kentucky. Coxco Realty, LLC's (Coxco) environmental consultant, Eco-Tech, Inc. (Eco-Tech) originally delineated the property in August 1999. A wetland delineation report was submitted to the Louisville District (District) on October 18, 1999. Coxco's wetland consultant identified 13 separate wetland areas, totaling 14.4 acres on the property. The 13 forested wetland areas are dominated by red maple (Acer rubrum), green ash (Fraxinus pennsylvanica), sweetgum (Liquidambar styraciflua), pin oak (Quercus palustris), and swamp chestnut oak, (Q. michauxii). The wetland tracts were labeled A – M and range in size from wetland A at 11.86 acres to wetland L at 0.018 acres. The property is surrounded by urban, residential and agricultural development. A portion of wetland tract A is bisected by the Jefferson Boulevard Extension project. The center of wetland A is located approximately 1100 feet from Northern Ditch. Wetland A is located the closest to Northern Ditch. Wetland A is separated from Northern Ditch by another wetland that is located on property not owned by Coxco. This offsite wetland is separated from wetland A by a utility line road. There is no direct connection between the offsite wetland and any of the wetland tracts located on the Coxco property.

District regulatory staff performed a site visit on November 15, 1999. In a Memorandum For Record dated December 7, 1999, the District's Project Manager stated:

“The wetlands on the property are within the Pond Creek watershed but hydrology is obtained through direct precipitation. These areas are isolated from any stream or creek due to historic drainage alterations.”

By letter dated December 9, 1999, the District concurred with the consultant’s findings.

In a letter dated June 11, 2002, from Mr. William Bardenwerper to Ms. Lee Anne Devine, Coxco requested that the District re-evaluate its 1999 jurisdictional determination (JD) in light of the January 9, 2001, U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC). In the same letter, Mr. Bardenwerper stated that the appellant believes the wetlands located on the property are:

“1) strictly rainfall driven; 2) not connected to “navigable waters” or tributaries of such “waters”; 3) are not adjacent to such “waters”; and 4) are, in fact, isolated.”

A District letter, dated August 23, 2002 to the appellant, informed them that the subject wetlands are still jurisdictional “waters of the United States”. The District stated:

“Based on information obtained on site and a review of previously submitted data, we have determined that wetlands on the subject tract of land are considered jurisdictional “waters of the United States.” This determination is based on the presence of wetlands adjacent to navigable or interstate waters, or that eventually drains or flow into navigable or interstate waters through a tributary system that may include man-made conveyances such as ditches or channelized streams.”

Coxco has appealed this determination to the Division Engineer. Based on the RFA, the appellant claims that the wetlands located on the property are isolated and no longer subject to Corps jurisdiction.

Information Received and its Disposition during the Appeal Review:

Information received from the Appellant:

- Following the March 18, 2003 appeal site visit, R.W. Moore Engineering submitted a revised site map showing the 100-year floodplain, a FEMA Flood Insurance Rate Map (FIRM) of the site, and a table showing the 100-year floodplain elevation. This information was also provided to the District. This information was considered clarifying information.

Appeal Decision and Instructions to the Louisville District Engineer (DE):

Appeal Reason: The appellant contends that the referenced wetlands are actually isolated and, therefore, should not be considered jurisdictional waters based on the *SWANCC* decision. (Taken from Mr. Bardenwerper’s October 17, 2002 RFA letter)

FINDING: This appeal reason has merit.

ACTION: The District's administrative record contains inconsistencies in how it applied Corps regulations when making its JD. The District shall reconsider its JD decision in accordance with Corps guidance and regulations and include sufficient documentation to support its JD.

DISCUSSION: The appellant feels that the Louisville District's interpretation of the "adjacent rule" regarding the subject wetlands is not valid based on the *SWANCC* decision. Coxco contends that the wetlands at issue do not border or neighbor a navigable water or its tributary, nor is it contiguous to a navigable water or its tributary, and that the wetlands are not located in the floodplain. Further, the appellant contends that the wetlands are hydrologically driven by direct precipitation and that any drainage towards or into a navigable or interstate water from the Coxco wetlands is strictly ephemeral. Appellant contends that the District's JD was result-driven by using an arbitrary and vague adjacency rule and ephemeral surficial connection to establish jurisdiction.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Supreme Court held that the Army Corps of Engineers had exceeded its authority in asserting Clean Water Act (CWA) jurisdiction pursuant to §404(a) over isolated, intrastate, non-navigable waters under 33 C.F.R. §328.3(a)(3), based on their use as habitat for migratory birds pursuant to preamble language commonly referred to as the "Migratory Bird Rule," 51 Fed. Reg. 41217 (1986). Because *SWANCC* limited use of 33 C.F.R. §328.3(a)(3) as a basis of jurisdiction over certain isolated waters, it has focused greater attention on CWA jurisdiction generally, and specifically over tributaries to jurisdictional waters and over wetlands that are "adjacent wetlands" for CWA purposes.

SWANCC clearly eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. However, the Supreme Court did not disturb its earlier holding in *United States v. Riverside-Bayview Homes* (474 U.S. 121 (1985)) when it rendered its decision in *SWANCC*. The Court in *Riverside* found that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with' jurisdictional waters." 474 U.S. at 134. Thus, wetlands adjacent to traditional navigable waters clearly remain jurisdictional after *SWANCC*. For many years, EPA and the Corps have interpreted their regulations to assert CWA jurisdiction over non-navigable tributaries of navigable waters and their adjacent wetlands. Courts have generally upheld the view that traditional navigable waters and, generally speaking, their tributary systems (and their adjacent wetlands) remain subject to CWA jurisdiction. The Corps and EPA currently define "adjacent" as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" 33 C.F.R. §328.3(c); 40 C.F.R. §230.3(b). The Corps also defines the term "waters of the United States" to include "wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (a)(1) through (6) of this section" (33 CFR §328.3(a)(7)). Adjacency has not, however, been held to

include a series of wetlands which are completely separated from each other by a series of narrow upland features.

In the post-SWANCC landscape, the Corps' jurisdiction is less clear where wetlands are not directly adjacent to navigable waters. See, e.g., *United States v. Rapanos*, 190 F. Supp. 1001 (E.D.Mich. 2002) (government appeal pending); *United States v. Needham*, No. 6:01-CV-01897, 2002 WL 1162790 (W.D.La. Jan. 23, 2002) (government appeal pending); *United States v. Newdunn*, 195 F. Supp.2d 751 (E.D. Va. 2002) (government appeal pending); and, *United States v. RGM Corp.*, 222 F.Supp.2d 780 (E.D.Va. 2002) (government appeal pending). However, a number of courts have held that waters connected to traditional navigable waters only intermittently or ephemerally are subject to CWA jurisdiction. See, e.g., *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir.2001).

The actual physical closeness of a wetland to a navigable water, or water that is a part of a surface tributary system, is one factor in determining adjacency. The existence of a hydrological connection is another important factor. Relationships between a navigable water or a surface tributary system must exist to be considered adjacent. Otherwise, the wetland is considered isolated. Examples of hydrologic connections include a surface water connection such as any stream, continuous wetland system, ditch, or watercourse and manmade conveyances such as culverts that carry water from a wetland to navigable waters, or waters that are a part of a surface tributary system, during normal expected flows or predictable flood events.

Three separate Memorandum For the Record (MFR) are contained in the administrative record. These MFRs describe the conditions found at the site. In a December 1999 MFR, the District stated:

"Thirteen (13) areas of jurisdictional wetland area are located on the property. The entire site has Robertsville silt loam which is listed as a hydric soil in Jefferson County, Kentucky. The wetlands on the property are within the Pond Creek watershed but hydrology is obtained through direct precipitation. These areas are isolated from any stream or creek due to historic drainage alterations."

In a November 2001 MFR, the District stated:

"Historically, prior to the 1900's, the area was part of a large swamp area that has since been ditched and drained connecting it to the tributary system of the Pond Creek watershed. However, there are no ditches or drains on the subject parcel of land that connect any of the wetland areas with the tributary system. A brief review of the existing conditions finds that Northern Ditch is the closest ditch/drain to the parcel of land. Moving south, yet adjacent to Northern Ditch is a large wetland complex¹. Continuing south away from Northern Ditch is a utility line type road and then the subject parcel of land. Northern Ditch is approximately 1100 feet from the center of the large wetland complex on the subject parcel of land.

¹ This wetland is not located on the Coxco property.

The wetlands on the subject parcel of land are rainfall driven. A review of the frequency flooding data on Northern Ditch indicates that overbank flooding would occur at approximately the 50-year event.² Hence, these wetlands fall within the 100-year floodplain of Northern Ditch.”

The District’s August 22, 2002 MFR stated that “the subject parcel of land does not have a direct connection (i.e. channel) to the surface tributary system. However, given the proximity to Northern Ditch and Slop Ditch, the wetlands occurrence within the floodplain of the tributaries to Pond Creek and the historical and present ecological relationship between these wetlands and Pond Creek, these wetlands are adjacent to the tributary system of a navigable water.”

The appeal site visit and information contained in the administrative record show that Pond Creek and its associated wetlands have been impacted by man’s activities. Confusion is evident concerning the location of the boundaries of the 100-year floodplain on the property. The District Hydrology and Hydraulic Branch determined the floodplain elevation to be at 467.0 feet (no datum listed).² The appellant determined the 100-year floodplain elevation to be 465.2 feet (no datum listed). The appellant based their findings on information obtained from the Metropolitan Sewer District (MSD) and the FEMA FIRM. The District also based its determination on information obtained from the MSD and was informed by MSD that the project site “would be inundated by the ‘fully developed’ scenario 100-year event.”

During the appeal meeting, the District stated that in the case of wetlands located in the Pond Creek watershed, wetlands located outside the 100-year floodplain were considered to be adjacent if they were neighboring or bordering to wetlands located in the 100-year floodplain. Because of confusion regarding the District’s policy regarding “adjacency”, the Review Officer asked for further clarification. The District stated:

“The Coxco site has wetlands that are located within the 100 year floodplain and outside the 100 year floodplain of the tributary system. The tributaries are locally known as Northern and Slop Ditch, but they both are channelized tributaries of Pond Creek which eventually flow to the Ohio River.

What makes this site confusing and ironic is that the wetlands closest to Northern Ditch are located outside the mapped 100 year floodplain (assuming the mapping is accurate) and the wetlands furthest from Northern Ditch are located within the 100 year floodplain. The District has no written policy on adjacency. Our practice/policy in Pond Creek has been to consider wetlands in the 100 year floodplain to be adjacent, but also include wetlands which neighbor or border the tributary regardless of whether they are located within the 100 year floodplain to be adjacent. In the case of the Coxco property and the adjacent property, wetlands exists which border or neighbor the tributary. The wetland complex which occupies the Coxco site and the site north of Coxco are a patchwork of remaining wetlands which we consider to be adjacent.”

The administrative record and clarifying discussions during the appeal meeting established that the wetlands located on the site are precipitation driven, have no direct connection with each

² The District’s H&H Branch completed models for a 1 yr, 2 yr, 10 yr, 25 yr, 50 yr, 100 yr & 500 yr flood event.

other and have no direct connection to any navigable water or tributary of a navigable water. Further, large portions of the wetlands are located outside the FEMA FIRM 100-year floodplain.

The District inconsistently applied §328.3(a)(7) and §328.3(c) concerning the definition of “waters” and “adjacency” to the Pond Creek wetlands, giving the appearance of a result-driven decision. The administrative record shows that while the District determined the wetlands were adjacent to “waters of the United States”, the District also states that there was no direct connection from the Pond Creek wetlands to any navigable water or tributary of a navigable water. Further, the administrative record indicates inconsistencies in the District’s placement of “adjacent” wetlands within or outside of the 100-year floodplain in selected watersheds. The District’s administrative record also does not contain information supporting their determination of the 100-year floodplain elevation. Therefore, I cannot conclude that the District’s administrative record leads to a reasoned conclusion that the wetlands on the site are adjacent to a tributary of a navigable water. This reason for appeal has merit.

CONCLUSION: For the reasons stated above, I conclude that this Request For Appeal has merit. The approved JD is remanded back to the District to re-evaluate its adjacency policy and reconsider the JD decision as necessary. The District’s reconsideration shall include determining the 100-year floodplain elevation on the property and sufficient documentation to support its JD.

FOR THE COMMANDER:

A handwritten signature in black ink, reading "Suzanne L. Chubb". The signature is written in a cursive, flowing style.

SUZANNE L. CHUBB
Regulatory Program Manager
Great Lakes & Ohio River Division